SUPREME COURT NO. 95632-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN MAYFIELD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge
The Honorable Michael Sullivan, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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RULES, STATUTES AND OTHER AUTHORITIES

A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. Is a Gunwall[1] analysis required for Washington courts to undertake an independent analysis of article I, section 7?

2. Is the federal attenuation doctrine incompatible with article I, section 7 of the Washington Constitution?

3. Even under the attenuation doctrine, was John Mayfield's consent to search vitiated by the ongoing illegal seizure, making the search of Mayfield's person and vehicle unconstitutional?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Mayfield with one count of possession of methamphetamine with intent to deliver. CP 3-4. The trial court held a CrR 3.6 hearing pursuant to Mayfield's motion to suppress all evidence discovered in the search of his person and his truck. CP 7-15.

On January 3, 2015, Mayfield was tired and having vehicle trouble, so he coasted his truck to a stop in the driveway of what looked like a church parking lot. RP 6, 18-19, 33. Mayfield fell asleep in the driver's seat. RP 33. The driveway, as it turned out, also provided access to Derek Salte's home. RP 6.

Salte returned home to find Mayfield blocking his driveway and attempted to wake Mayfield up several times. RP 6. Mayfield awoke to

[1] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Salte "right at [his] window," "cussing" at him, telling Mayfield to get the "heck" off his property. RP 27. Mayfield attempted to put his truck in gear, but "[t]he engine would just rev and nothing would go," consistent with Mayfield's description of car trouble. RP 6. Unable to move his vehicle and afraid he would be assaulted by Salte, Mayfield left out the passenger door and ran to the end of the street. RP 7, 27. Salte called the police. RP 5-6.

Deputy Andrew Nunes responded. RP 5-6. He did not see anything suspicious inside Mayfield's vehicle when he turned it off and shut the passenger door. RP 7-8. Nunes called Sergeant Cory Huffine for routine backup. RP 10. Mayfield saw Nunes from down the road and felt it was safe to return, so he walked back towards his truck. RP 27.

Nunes contacted Mayfield and asked why he was parked in Salte's driveway. RP 8-9. Mayfield told Nunes he stopped because he needed to use the restroom and later told Nunes he was also having car trouble. RP 8. Mayfield explained he left his vehicle because "Mr. Salte was confrontational" and "he was concerned that he was going to be assaulted by Mr. Salte." RP 8-9. Sometime during this conversation, Huffine arrived and stood "[r]ight next" to Mayfield. RP 10, 28.

Mayfield produced his identification upon Nunes's request and Nunes confirmed Mayfield was the registered owner of the truck. RP 11-

12. Nunes further confirmed Mayfield did not have any outstanding warrants. RP 12. Mayfield did not make any furtive or dangerous movements to make Nunes suspect he was armed. RP 23. Nor did Nunes believe Mayfield to be under the influence of drugs or alcohol. RP 23.

Nunes admitted at this point he "did not suspect [Mayfield] of committing any specific crime." RP 23. But dispatch advised Nunes that Mayfield had a felony history with an incendiary device and was on active Department of Corrections (DOC) supervision. RP 12-14, 21-22. Nunes therefore continued his contact with Mayfield, explaining "I kind of wanted to see who I was dealing with." RP 12-13. Nunes also explained he wanted to search Mayfield, believing his criminal history "indicated that there may be a drug aspect to this." RP 13-14. But Nunes was not aware of any prior drug-related offenses. RP 21-22.

Nunes proceeded to ask Mayfield "if he had anything on him that was illegal or that I should be concerned about," like drugs or weapons, which Mayfield denied. RP 13. Nunes next asked Mayfield about his drug use. RP 23. Mayfield admitted to using drugs three weeks prior, which "piqued" Nunes's interest. RP 15, 23.

Nunes then asked to search Mayfield's person, telling Mayfield, "you don't have to let me search you." RP 13. Mayfield consented. RP 13. Nunes found $464 in cash crumpled in Mayfield's front pocket and a

wallet in his back pocket. RP 14. Nunes believed this was consistent with purchasing or selling drugs. RP 14. Nunes returned Mayfield's money and wallet to him, but turned his attention to Mayfield's truck, asking "if he had anything illegal in his vehicle," which Mayfield denied. RP 15.

Nunes then asked to search Mayfield's truck. RP 15-16. Nunes gave Mayfield Ferrier[2] warnings: "So I advised him that he had the right to refuse the search, he could restrict the search, and he could revoke the search at any time." RP 15-16. Nunes did not inform Mayfield of his Miranda[3] rights. RP 25. Mayfield consented. RP 15-16. Nunes found baggies and methamphetamine in Mayfield's vehicle. RP 17, 197.

The trial court denied Mayfield's motion to suppress. CP 20. In its written order, the court found Nunes's contact ripened into a seizure when he began asking about Mayfield's drug use, whether he had anything illegal on his person, and then asked to frisk Mayfield. CP 20. The court found the seizure was illegal because Nunes did not have reasonable, articulable suspicion Mayfield was engaged in criminal activity. CP 20.

The court then applied the federal attenuation factors. CP 20. The court found there was "very close" temporal proximity between the illegal detention and the search of Mayfield's truck. CP 20. The court further

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[2] State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

found "[t]here were no significant intervening circumstances." CP 20. The court found Nunes's initial purpose was to determine why Mayfield had parked in Salte's driveway, but his "contact became a drug investigation that was not based on any reasonable and articulable suspicion of actual criminal conduct." CP 20. Despite all these factors weighing in Mayfield's favor, the court found Nunes's giving of Ferrier warnings prior to receiving Mayfield's consent "sufficiently attenuates [the] search from any illegal detention." CP 20.

Mayfield was thereafter convicted as charged by a jury. CP 52. Mayfield appealed, challenging the search of his person and his truck under article I, section 7 as well as the Fourth Amendment.[4] Mayfield did not conduct a Gunwall analysis under article I, section 7, nor did the State contend a Gunwall analysis was necessary.

A majority of the court of appeals panel refused to consider the merits of Mayfield's article I, section 7 challenge, holding Mayfield waived the issue by failing to conduct a Gunwall analysis. Majority, 4-7. Chief Judge Bjorgen dissented, reasoning a Gunwall analysis is no longer

[4] Mayfield also included argument in his opening brief below as to why the trial court correctly found Nunes's progressive intrusion amounted to an illegal seizure. Br. of Appellant, 13-20. The State conceded Nunes's "continued contact with [Mayfield] developed into a drug investigation absent any reasonable and articulable suspicion." Br. of Resp't, 8-9. The court of appeals likewise agreed "the seizure was illegal because Deputy Nunes did not have reasonable, articulable suspicion." Majority, 9. Mayfield therefore does not address the illegality of the seizure in this brief, as the issue is not contested.

necessary and so "the search of the truck should have been judged under article I, section 7." Dissent, 14-15. The majority also rejected Mayfield's Fourth Amendment challenge, holding, "[w]hen the intervening circumstances include giving Ferrier warnings, a search is sufficiently attenuated from the illegal seizure." Majority 4.

Mayfield moved to reconsider on several grounds and provided the court of appeals with a Gunwall analysis. Motion, 11-15. The court denied the motion without calling for an answer from the State.

C. SUPPLEMENTAL ARGUMENT

1. NO GUNWALL ANALYSIS IS NECESSARY FOR THIS COURT TO DECIDE WHETHER ATTENUATION IS CONSISTENT WITH ARTICLE I, SECTION 7.

a. This court has repeatedly recognized a *Gunwall* analysis is no longer necessary under article I, section 7.

The majority below relied primarily on this court's recent decision in Blomstrom v. Tripp, 189 Wn.2d 379, 402 P.3d 831 (2017), to avoid the merits of Mayfield's state constitutional argument. Majority 5-6. The Blomstrom court conducted a brief Gunwall analysis and concluded it supported a separate analysis of article I, section 7 "in the context of urinalysis imposed as a pretrial release condition." 189 Wn.2d at 401-02.

In holding a Gunwall analysis is still required in every new article I, section 7 context, the majority in Mayfield's case reasoned the

Blomstrom parties "were required to and did brief and analyze the Gunwall factors." Majority, 6. But, as Chief Judge Bjorgen pointed out in his dissent, both parties in Blomstrom independently briefed the Gunwall factors; "None of the parties raised the issue whether a Gunwall analysis was in fact required in this context." Dissent, 11.

The majority in Mayfield therefore relied on dicta "to suggest a rule of decision that was neither briefed by the parties nor analyzed by the court." Dissent, 11-12; In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue."). Nowhere did the Blomstrom court overrule years of precedent holding a Gunwall analysis is no longer necessary before undertaking an independent article I, section 7 analysis. Lunsford v. Saberhagen, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) ("Where we have expressed a clear rule of law . . . , we will not—and should not—overrule it sub silentio.").

Chief Judge Bjorgen was correct in his dissent that a Gunwall analysis is unnecessary to analyze the search of Mayfield's truck under article I, section 7. Washington courts conduct a two-step inquiry when a party claims a state constitutional provision provides greater protection than its federal counterpart. McNabb v. Dep't of Corr., 163 Wn.2d 393, 399, 180 P.3d 1257 (2008). Courts first "determine whether an

independent analysis of the state constitutional provision is warranted." Id. As part of this inquiry, courts consider "whether it is settled law that an independent analysis should be conducted when interpreting the state constitutional provision." Id. If so, courts go to step two and proceed with independent analysis. Id. If not, a Gunwall analysis is required to determine whether the state provision should be interpreted independently from its federal counterpart. Id.

This is where the majority in Mayfield's case went wrong. The first step has already been met in the context of article I, section 7: "It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595 (2007). This court has therefore repeatedly recognized "a Gunwall analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis."[5] State v. Surge,

[5] See, e.g., State v. Snapp, 174 Wn.2d 177, 193 n.9, 275 P.3d 289 (2012) ("[A] Gunwall analysis is unnecessary under article I, section 7 to determine whether it should be given independent effect."); State v. Fry, 168 Wn.2d 1, 6 n.2, 228 P.3d 1 (2010) (same); State v. Harrington, 167 Wn.2d 656, 663 & n.2, 222 P.3d 92 (2009) (same); McNabb, 163 Wn.2d at 400 (same); State v. Eisfeldt, 163 Wn.2d 628, 636 & n.5, 185 P.3d 580 (2008) (same); Chenoweth, 160 Wn.2d at 463 (same); State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 2 (2007) (same); State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) (same); State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (same); State v. Vickers, 148 Wn.2d 91, 108 n.43, 59 P.3d 58 (2002) (same).

160 Wn.2d 65, 71, 156 P.3d 208 (2007) (footnote omitted). The court of appeals' majority decision is plainly contrary to this wealth of authority.

Proceeding to step two, then, "[t]he only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Id. The focus of this analysis "is on whether the language of the state constitutional provision and its prior interpretations actually compel a particular result." McKinney, 148 Wn.2d at 26. "This involves an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Chenoweth, 160 Wn.2d at 463.

Mayfield provided this analysis below, with an 11-page discussion of why the text, purpose, and prior interpretations of article I, section 7 are incompatible with attenuation. Br. of Appellant, 21-32. This court should reiterate its longstanding rule that a Gunwall analysis is no longer necessary under article I, section 7, and reach the merits of Mayfield's state constitutional challenge.

b. Even if still required in some contexts, a *Gunwall* analysis is not necessary here.

Even if a fresh Gunwall analysis may be required in some article I, section 7 cases, it is not required here. In Utah v. Strieff, __U.S.__, 136 S.

Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016), the Court recognized a subset of exceptions to the exclusionary rule: those that "involve the causal relationship between the unconstitutional act and the discovery of evidence." The Court noted three examples: the independent source doctrine, inevitable discovery doctrine, and attenuation doctrine. Id.

This court did not conduct a Gunwall analysis in determining the independent source doctrine complies with article I, section 7. State v. Gaines, 154 Wn.2d 711, 722, 116 P.3d 993 (2005). Nor did this court conduct a Gunwall analysis in concluding inevitable discovery "is at odds with the plain language of article I, section 7." State v. Winterstein, 167 Wn.2d 620, 635, 220 P.3d 1226 (2009). As Chief Judge Bjorgen emphasized below, "[i]f a Gunwall analysis was not needed in Winterstein, it should not be required here." Dissent, 12. Consistent with Gaines and Winterstein, a Gunwall analysis is not necessary to determine whether the third and final doctrine—attenuation—runs afoul of article I, section 7.

2. THE FEDERAL ATTENUATION DOCTRINE IS INCOMPATIBLE WITH ARTICLE I, SECTION 7.

When presented with arguments under both the state and federal constitution, courts begin with the state constitution. State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Washington courts have applied the

federal attenuation doctrine, but a majority of this court has never determined whether it is compatible with article I, section 7.[6]

a. The text and purpose of article I, section 7 are different from the Fourth Amendment.

Article I, section 7 guarantees "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment, by contrast, protects only the right to be free from "unreasonable searches and seizures."

With the Fourth Amendment's focus on reasonableness, the federal exclusionary rule exists to deter police misconduct. Strieff, 136 S. Ct. at 2063; Eisfeldt, 163 Wn.2d at 634. "The [federal] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960). It has therefore "never been applied except where its deterrence benefits outweigh its substantial social costs." Hudson v. Michigan, 547 U.S. 586, 594-95, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (internal quotation marks omitted) (quoting

[6] See, e.g., State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011) (lead opinion) (recognizing "we have not explicitly adopted the attenuation doctrine under article I, section 7," but "we have employed it time and again in prior decisions"); id. at 937 (C. Johnson, J., dissenting) (calling on the court to reject attenuation "as fundamentally at odds with our jurisprudence"); State v. Armenta, 134 Wn.2d 1, 10 n.7, 17, 948 P.2d 1280 (1997) (applying attenuation analysis but declining to address state constitution).

Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998)).

Article I, section 7, on the other hand, is "unconcerned" with reasonableness, as the word "reasonable" does not appear anywhere in its text. Eisfeldt, 163 Wn.2d at 634-35. "Rather, it prohibits any disturbance of an individual's private affairs without authority of law." Snapp, 174 Wn.2d at 194. Thus, while our state exclusionary rule "also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy." State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). "With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically." Id.

b. The attenuation doctrine, as a creature of the federal exclusionary rule, aims to deter police misconduct, while our state exclusionary rule serves primarily to vindicate individual privacy rights.

The premise behind the attenuation doctrine is there comes a point when "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" Wong Sun v. United States, 371 U.S. 471, 487, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (quoting Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)). As a creature of the federal exclusionary rule, the attenuation doctrine is heavily rooted in the

goal of deterring police misconduct. Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

The United States Supreme Court has therefore rejected a "but for" rule and instead adopted a case-by-case balancing test for determining when the causal connection between a Fourth Amendment violation and subsequently discovered evidence is sufficiently attenuated. Id. at 603. The attenuation factors to consider are: (1) the temporal proximity of the illegality and the discovery of evidence, (2) the presence of intervening circumstances, (3) "and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-04. A fourth factor is whether Miranda warnings were given after the initial illegality. Id.

The most important factor of this balancing test is "the purpose and flagrancy of the official misconduct." Id. at 604. This factor reflects the rationale of the federal exclusionary rule "by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." Strieff, 136 S. Ct. at 2063.

But the purpose and flagrancy of the police misconduct matter little under our state exclusionary rule, which "is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusion." Chenoweth, 160 Wn.2d at 472 n.14. What matters is that there

was a violation at all. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (recognizing "the emphasis [of article I, section 7] is on protecting personal rights rather than on curbing governmental actions," and so "whenever the right is unreasonably violated, the remedy must follow").

This court's decision in Afana demonstrates why attenuation runs afoul of article I, section 7 on this point. The Afana court rejected the federal "good faith" exception to the exclusionary rule. 169 Wn.2d at 184. The exception "is applicable when a search or seizure was unconstitutional but the police officer's belief that it was constitutional was objectively reasonable at the time." Id. at 180. Under article I, section 7, however:

> [I]f a police officer has disturbed a person's "private affairs," we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "authority of law." If not, any evidence seized unlawfully will be suppressed.

Id. Because the good faith exception does not do that, it is incompatible with article I, section 7. Id. at 184.

The attenuation doctrine suffers the same fatal flaw as the good faith exception. It concedes a connection between the illegality and the evidence in question but, rather than automatically exclude the evidence, aims to determine whether deterrence of police misconduct requires that result. See Strieff, 136 S. Ct. at 2063 (excusing a police officer's illegal

stop where "all the evidence suggests that the stop was an isolated instance of negligence," rather than a purposeful or flagrant violation). For this reason, the attenuation doctrine cannot be squared with our "nearly categorical" state exclusionary rule. Winterstein, 167 Wn.2d at 636.

c. The attenuation doctrine does not disregard the illegally obtained evidence, as required under our state constitution.

The attenuation doctrine is also inconsistent with article I, section 7 because it does not disregard the illegally obtained evidence. Three decisions by this court are instructive.

In Gaines, this court concluded the independent source doctrine complies with article I, section 7. 154 Wn.2d at 718. Under that doctrine, unlawful police action does not require exclusion of evidence provided the evidence "ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." Id. The doctrine, in other words, recognizes probable cause may exist for a warrant based on legally obtained evidence *after* the tainted evidence is suppressed. Id. This both vindicates privacy rights by suppressing the illegally obtained evidence and ensures "the State is placed in neither better nor worse position as a result of the officers' improper actions." Id. at 720.

This court subsequently rejected the federal inevitable discovery doctrine as incompatible with article I, section 7 in Winterstein, 167

Wn.2d at 636. The doctrine applies when there is a reasonable probability the evidence in question would have been discovered from another, untainted source. State v. Warner, 125 Wn.2d 876, 889, 889 P.2d 479 (1995). In other words, "[t]he State seeks to admit evidence that it claims the police would have discovered notwithstanding the violation of the defendant's constitutional rights." Winterstein, 167 Wn.2d at 634. Unlike the independent source doctrine, the inevitable discovery doctrine "does not disregard illegally obtained evidence," and is therefore at odds with article I, section 7. Id. at 634-35.

This court reached a similar result in Afana, discussed above. Like the inevitable discovery doctrine, the good faith exception "does not disregard illegally obtained evidence." Afana, 169 Wn.2d at 181. The good faith exception is therefore "similarly incompatible with Washington's nearly categorical exclusionary rule." Id.

The same is true of the attenuation doctrine: "Just like the inevitable discovery exception rejected in Winterstein and the good faith exception rejected in Afana, this attenuation exception allows illegally obtained evidence to be admitted." Eserjose, 171 Wn.2d at 939-40 (C. Johnson, J., dissenting). And, contrary to Gaines, attenuation puts police in a better position because of their constitutional violations.

In Strieff, for instance, the Court held evidence to be admissible where the police officer illegally detained Strieff but searched him after discovering an outstanding arrest warrant. 136 S. Ct. at 2064. Nunes similarly obtained Mayfield's consent to search during an ongoing illegal seizure. In both cases, the illegality was deemed irrelevant and the police benefited from their unlawful actions. Article I, section 7 does not allow such a result—the illegally discovered evidence must be suppressed.

d. Attenuation requires speculation and a balancing of factors that courts do not engage in under article I, section 7.

Attenuation is further problematic under our state constitution. The Winterstein court rejected the inevitable discovery doctrine in part because it is "necessarily speculative." 167 Wn.2d at 634. Inevitable discovery rests on the State's ability to prove that, despite unlawful police conduct, the evidence in question would necessarily have been discovered through proper means. Id. at 634-35.

Attenuation is similar, in that it rests on the State's ability to prove, despite unlawful police conduct, the individual would have confessed or the evidence would have been discovered anyway. See Eserjose, 171 Wn.2d at 942 (lead opinion) (positing Eserjose maintained his innocence until his accomplice confessed, "which suggests that it was this information, not the illegal arrest, that induced the confession"). Both

doctrines call for a speculative hindsight examination of the same question: "What if the police had not acted unlawfully?" See United States v. Ceccolini, 435 U.S. 268, 283, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978) (Burger, C.J., concurring) (emphasizing the "scholastic hindsight" inherent in the attenuation doctrine). It is not clear why one exception would be compatible with article I, section 7 while the other is not.[7]

Furthermore, a balancing of interests is improper under article I, section 7: "the balancing of interests should not be carried out when evidence is obtained in violation of a defendant's constitutional rights." Winterstein, 167 Wn.2d at 632. The attenuation doctrine does just that, requiring a four-part balancing test that weighs the privacy interest at stake against the deterrent effect of the exclusionary rule.

e. The United States Supreme Court's recent decision in *Strieff* demonstrates it is imperative for this court to reject the attenuation doctrine.

The Supreme Court's recent decision in Strieff demonstrates how incompatible the attenuation doctrine is with article I, section 7. There, acting on an anonymous tip, a police officer surveilled a home and, after observing several visitors stay for only brief periods of time, suspected the

[7] State v. Smith, 177 Wn.2d 533, 552, 303 P.3d 1047 (2013) (Madsen, C.J., concurring in the result) ("It is inconsistent with our analysis in Winterstein to adopt the attenuation doctrine while rejecting the inevitable discovery doctrine when both implicate similar article I, section 7 interests."); Eserjose, 171 Wn.2d at 942 (C. Johnson, J., dissenting) ("[A]pplication of the exception would necessarily be speculative, a departure from our otherwise nearly categorical exclusionary rule.").

occupants were dealing drugs. Strieff, 136 S. Ct. at 2059. The officer stopped one visitor, Strieff, and detained him absent reasonable, articulable suspicion.[8] Id. at 2060. During the illegal seizure, the officer discovered Strieff had an outstanding arrest warrant for a minor traffic violation. Id. The officer arrested Strieff and searched him incident to arrest, discovering a baggie of methamphetamine. Id.

Applying the attenuation factors, the Court held "the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant." Id. at 2063. The Court reasoned the warrant was a "critical intervening circumstance that [was] wholly independent of the illegal stop," breaking the causal chain between the illegality and the discovery of evidence. Id.

The Court further emphasized "it is especially significant that there is no evidence that [the officer's] illegal stop reflected flagrantly unlawful police misconduct." Id. The Court believed the officer "was at most negligent," explaining, "[f]or the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." Id. at 2063-64. The Court explained the outcome might be different if there was evidence of wanton dragnet searches. Id. at 2064.

[8] The officer did not know how long Strieff had been at the house and "thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction." Strieff, 136 S. Ct. at 2063.

Thus, the federal attenuation doctrine permits police to detain an individual absent reasonable suspicion and then allows admission of any evidence discovered, so long as the officer is lucky enough to discover the individual has an outstanding arrest warrant. Justice Sotomayor criticized the majority's broad and troubling expansion of the attenuation doctrine:

> The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.

Id. at 2064 (Sotomayor, J., dissenting).

Under Strieff, there is no vindication for the individual's privacy rights violated by the officer's illegal intrusion. Nor is there any incentive for police to comply with Terry[9] before illegally seizing someone, because the individual may very well have an arrest warrant, negating all prior illegality. Strieff, 136 S. Ct. at 2073-74 (Kagan, J., dissenting) (asserting the majority opinion "creates unfortunate incentives for the police—indeed, practically invites them to do what [the officer] did here," particularly given the massive number of outstanding arrest warrants).

[9] Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

This court has held time and again that article I, section 7 does not forgive such violations even where the Fourth Amendment does.[10] "With every encroachment on Fourth Amendment protections by the United States Supreme Court, this court has reacted by rejecting such changes and preserving the heightened protections of article I, section 7." Eserjose, 171 Wn.2d at 937-38 (C. Johnson, J., dissenting). An officer's luck in discovering an outstanding arrest warrant—or obtaining consent to search—does not and should not erase the constitutional violation. Article I, section 7 demands that a remedy must follow. Afana, 169 Wn.2d at 180.

Proceeding in lockstep with federal attenuation analysis under Strieff does a disservice to the text and purpose of article I, section 7, which "'mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.'" Winterstein, 167 Wn.2d at 632 (quoting White, 97 Wn.2d at 110). The attenuation

[10] See, e.g., Snapp, 174 Wn.2d at 197 (rejecting a federal vehicle-search-incident-to-arrest exception under article 1, section 7); Eisfeldt, 163 Wn.2d at 641 (rejecting federal private search doctrine under article I, section 7); State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (holding pretextual traffic stops violate article I, section 7 even though they are permissible under the Fourth Amendment); Ferrier, 136 Wn.2d at 109-10 (departing from federal law and prohibiting "knock and talk" procedure unless specific warnings are given); State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990) (holding Washingtonians have a privacy interest in their curbside garbage).

doctrine does just that, particularly with the most recent retrenchment of privacy rights in Strieff. This court should reject it.

f. A *Gunwall* analysis demonstrates attenuation is inconsistent with our state constitution.

Mayfield maintains a Gunwall analysis is not required for this court to determine whether attenuation is consistent with article I, section 7. But he nevertheless provides one here, given the uncertainty created by the majority opinion below. The first, second, third, and fifth Gunwall factors "are uniform in any analysis of article I, section 7, and generally support analyzing our State constitution independently from the Fourth Amendment." Blomstrom, 189 Wn.2d at 401. Mayfield therefore analyzes only the fourth and sixth Gunwall factors.

(4) Preexisting state law. The Fourth Amendment was incorporated to the states in 1961. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). The Supreme Court first articulated the concept of attenuation in 1939 in Nardone and again in Wong Sun in 1963, where the Court held the connection between Wong Sun's illegal arrest and voluntary confession several days later "'had become so attenuated as to dissipate the taint.'" Wong Sun, 371 U.S. at 487 (quoting Nardone, 308 U.S. at 341). The Court later developed the four-part balancing test in 1975 in Brown, 422 U.S. at 603-04.

Despite existing under federal jurisprudence for more than 50 years, no Washington court has expressly adopted the attenuation doctrine under article 1, section 7. Several state supreme court justices have sharply criticized it. See, e.g., Smith, 177 Wn.2d at 552 (Madsen, C.J., concurring in the result); id. at 559 (Chambers, J., dissenting); Eserjose, 171 Wn.2d at 937 (C. Johnson, J., dissenting). Preexisting state law—Gaines, Winterstein, and Afana—demonstrates federal exceptions to the exclusionary rule are incompatible with article I, section 7 when they do not vindicate individual privacy rights, do not disregard illegally obtained evidence, are speculative, and require balancing of interests. The attenuation doctrine does all of the above. Preexisting state law therefore weighs in favor of rejecting attenuation under article 1, section 7.

(6) Matters of particular state or local concern. Mayfield has recognized privacy interests in his vehicle and his person under article I, section 7. Snapp, 174 Wn.2d at 187 (vehicle and its contents); Robinson v. City of Seattle, 102 Wn. App. 795, 810, 819, 10 P.3d 452 (2000) (body and bodily functions). "[P]rivacy matters are of particular state interest and local concern." State v. Johnson, 128 Wn.2d 431, 446, 909 P.2d 293 (1996). This reality is reflected in the very text of article 1, section 7, with its focus on privacy as opposed to reasonableness. It is therefore a matter of particular state concern to protect Washingtonians from police intrusion

into their private affairs without authority of law—here, the request to search Mayfield's person and truck during an ongoing illegal seizure.

Nor is there "need for national uniformity" as to the application of the attenuation doctrine. Robinson, 102 Wn. App. at 819. As Mayfield has repeatedly demonstrated, Washington courts can and frequently do depart from Fourth Amendment jurisprudence. This factors also weighs in favor of rejecting the attenuation exception.

g. Deputy Nunes illegally seized Mayfield and obtained his consent without authority of law.

Mayfield was illegally seized when Nunes began a drug investigation absent reasonable, articulable suspicion of criminal activity. Nunes requested Mayfield's consent to search his person and his truck during that ongoing unlawful seizure. Nunes therefore invaded Mayfield's constitutional right to privacy and acted without "authority of law" in obtaining Mayfield's consent. Article I, section 7 demands that a remedy must follow: "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. This court should hold, regardless of any conceptualized attenuation, that the evidence discovered in the search of Mayfield's truck must be suppressed under article I, section 7.

3. EVEN UNDER THE ATTENUATION DOCTRINE, MAYFIELD'S CONSENT TO SEARCH WAS VITIATED BY THE ONGOING ILLEGAL SEIZURE.

Warrantless searches and seizures are generally per se unreasonable, in violation of the Fourth Amendment and article I, section 7. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State bears the burden of demonstrating a warrantless search or seizure falls into one of the "jealously and carefully drawn" exceptions to the warrant requirement. Id. at 171-72. One such exception is voluntary consent to search. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). However, "[a] consent to search obtained through exploitation of a prior illegality may be invalid even if voluntarily given." State v. Soto-Garcia, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992).

The attenuation doctrine balances four factors, discussed above, in an attempt to determine whether evidence was "come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT, 221 (1959)). "If evidence is obtained as the result of a defendant's consent to search or confession, the voluntariness of the consent or confession is a threshold requirement but is not alone sufficient to purge the evidence of the primary taint." State v.

Avila-Avina, 99 Wn. App. 9, 15, 991 P.2d 720 (2000) (citing Brown, 422 U.S. at 604), overruled on other grounds by Winterstein, 167 Wn.2d 620.

This court has not expressly decided whether Ferrier warnings purge the taint of an illegal seizure.[11] However, this court's decision in Armenta, read together with the United States Supreme Court's analogous decisions in Brown and Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982), answer this question. The answer is no.

Armenta and his co-defendant Cruz were illegally seized absent reasonable, articulable suspicion. Armenta, 134 Wn.2d at 16. The officer asked for Armenta's consent to search his vehicle and told Armenta he did not have to consent. Id. at 6. Armenta did not dispute on appeal that he "freely and voluntarily consented to a search of his vehicle." Id. at 16-17.

This court held "Armenta's consent, although voluntary, was tainted by the prior illegal detention." Id. at 17. The court explained Armenta consented immediately after he was illegally seized. Id. "[T]here were essentially no intervening circumstances," nor had Armenta and Cruz been read their Miranda rights. Id. Though the officer was not

[11] Ferrier warnings are required only "where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search." State v. Khounvichai, 149 Wn.2d 557, 563, 69 P.3d 862 (2003). However, whether the individual was advised he or she could refuse consent is a factor in determining the voluntariness of the consent. Reichenbach, 153 Wn.2d at 132.

acting maliciously, it was "apparent that he was 'fishing' for evidence of illegal drug trafficking." Id.

Armenta differs little from Mayfield's case. Armenta voluntarily consented to the search after being informed of his right to refuse consent. Mayfield voluntarily consented after he was informed of his ability to refuse consent, along with his right to revoke consent or restrict the search. There is no basis to conclude, as the majority essentially did below, that these two additional warnings constituted a sufficient intervening circumstance so as to distinguish Mayfield's case from Armenta.

The majority did not discuss Armenta. Instead, the majority held, without citation or discussion, the Ferrier warnings constituted an intervening circumstance because they "ensured that Mayfield's consent was voluntary even though there was an illegal seizure." Majority, 9. But voluntariness is always a threshold requirement when a confession or consent to search is at issue—it is not dispositive in the attenuation inquiry. Taylor, 457 U.S. at 690; Brown, 422 U.S. at 602, 604; Avila-Avina, 99 Wn. App. at 15. The Armenta court did not consider voluntary consent to be an intervening circumstance. The key question is, instead, whether a "free and voluntary consent" is "'untainted by the illegal seizure.'" Soto-Garcia, 68 Wn. App. at 26-27 (quoting State v. Rodriguez, 32 Wn. App. 758, 762, 650 P.2d 225 (1982)).

In addition to being inconsistent with Armenta, the conclusion that Ferrier warnings constitute an intervening circumstance cannot be squared with the analogous decisions in Brown and Taylor. Brown was arrested without probable cause, read his Miranda rights, and confessed less than two hours later. Brown, 422 U.S. at 592-95, 604. The Court reversed, holding "there was no intervening event of significance whatsoever" between the illegal arrest and Brown's confession. Id. at 604.

The Brown Court rejected a rule that Miranda warnings alone break the causal link between the illegality and discovery of evidence:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expendent of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

Brown, 422 U.S. at 602-03 (footnote omitted) (citation omitted) (quoting Mapp, 367 U.S. at 648).

The Court reached the same conclusion in Taylor. There, Taylor was arrested without probable cause, read his Miranda rights three times,

and confessed six hours later. Taylor, 457 U.S. at 688-91. The Court held there was no "meaningful intervening event" between the unlawful arrest and Taylor's confession. Id. at 691. The Court emphasized the fact that Taylor's confession was voluntary because of the Miranda warnings "does not cure the illegality of the initial arrest." Id. at 693.

The majority in Mayfield's case did exactly what the Supreme Court condemned in Brown. It gave talismanic significance to Ferrier warnings, which served to ensure only that Mayfield's consent was voluntary. Miranda and Ferrier are corollaries. Miranda helps ensure any confession given is voluntary. Taylor, 457 U.S. at 690. Ferrier likewise helps ensure a consent to search is voluntarily given. Ferrier, 136 Wn.2d 118-19. There is no reason, and the majority below gave none, that Ferrier warnings alone can purge the taint of an illegal seizure while Miranda warnings cannot.

Application of the attenuation factors is the only issue that remains. There can be no real dispute the illegal seizure and Mayfield's consent to search were close in time. RP 56 (State conceding close temporal proximity); CP 20 (trial court finding temporal proximity of seizure and consent "were very close together").

Nor were there any significant intervening circumstances. As demonstrated, the Ferrier warnings were not an intervening

circumstance.[12] The illegal seizure, request to search, and consent all happened in the same location within the span of a few moments.

Mayfield's case is distinguishable from, for instance, Eserjose. There, the lead opinion concluded Eserjose's confession was attenuated from his illegal arrest because Eserjose maintained his innocence until he learned his accomplice had confessed, "which suggest[ed] that it was this information, not the illegal arrest, that induced the confession." Eserjose, 171 Wn.2d at 923 (lead opinion). In reaching this conclusion, the lead opinion emphasized "[i]f evidence is obtained 'without authority of law,' i.e., while the violation is ongoing, no time will have passed and no circumstances will have intervened, in which case the evidence will not be attenuated." Id. at 927. This is precisely the case here. Nunes obtained

[12] Federal circuit court decisions analyzing attenuation in consent to search cases vary wildly in their resolution of the issue. However, there appears to be general agreement that voluntary consent "is not in itself an intervening event which could remove the taint of the prior illegal seizure." United States v. Fox, 600 F.3d 1253, 1260 (10th Cir. 2010); see also United States v. Robeles-Ortega, 348 F.3d 679, 683-84 (7th Cir. 2003). In a well-reasoned decision, the Ninth Circuit held the defendant's "act of signing the permission to search form, which advised him of his right to refuse to consent," was not an intervening circumstance. United States v. Washington, 387 F.3d 1060, 1074 (9th Cir. 2004). Being advised of the right to refuse consent, the court explained, "does not have a tendency to distance the suspect from the coercive effects of temporally proximate constitutional violations." Id. Rather, "the suspect's desire to avoid suffering additional constitutional violations and/or a continuing unconstitutional detention . . . may prompt the suspect to avoid further confrontation by giving consent." Id. True intervening circumstances are those like "releasing an individual from custody, bringing an individual before a magistrate, or allowing an individual to consult with an attorney." Id. Of course, none of these happened in Mayfield's case.

Mayfield's consent to search while the illegal seizure was ongoing. RP 12-16. No time had passed and no circumstances had intervened.

Strieff further supports reversal on this point. The outstanding arrest warrant at issue there "predated" the officer's investigation and "was entirely unconnected with the stop." Strieff, 136 S. Ct. at 2062. Consequently, the warrant was "a critical intervening circumstance that [was] wholly independent of the illegal stop." Id. at 2063. Not so here, where Nunes obtained Mayfield's consent to search only by persisting with his illegal drug investigation. Mayfield's consent did not predate the illegal seizure; rather, it was part and parcel of it.

Nunes also purposefully pursued a drug investigation absent any founded suspicion of drug activity. The Strieff Court held, "[f]or the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." 136 S. Ct. at 2064. There, the officer legitimately suspected the house occupants were dealing drugs but failed to verify Strieff was a short-term visitor before stopping him. Id. at 2064. The stop was therefore "not a suspicionless fishing expedition 'in the hope that something would turn up.'" Id. (quoting Taylor, 457 U.S. at 691).

In Brown, by contrast, the illegal arrest "had a quality of purposefulness." 422 U.S. at 605. The detectives "embarked upon this

expedition for evidence in the hope that something might turn up," as evidenced by their later testimony that the purpose of their action was "for investigation." Id. The same was true in Armenta, where the officer "had [his] suspicions" and "wanted to get in the car." 134 Wn.2d at 17.

Nunes's drug investigation is similar to the purposeful intrusions in Brown and Armenta rather than the negligent conduct in Strieff. Nunes was investigating the relatively innocuous circumstance of Mayfield blocking Salte's driveway. RP 5-9. Nunes confirmed Mayfield was the registered owner of the truck; Mayfield did not have any outstanding warrants; he did not appear armed or dangerous; and there were no signs he was intoxicated. RP 11-12, 23. Nunes admitted he did not suspect Mayfield "of committing any specific crime." RP 23. His contact with Mayfield should have ended there.

Instead, Nunes persisted because of Mayfield's criminal history. RP 12-14. Nunes asked about Mayfield's drug use and whether he had any drugs on him, followed by a request to frisk. RP 13, 23. Similar to Armenta, Nunes admitted he wanted to search Mayfield "[b]ased on him being a convicted felon and active DOC supervision and the history that I looked at in our record system indicated that there may be a drug aspect to this." RP 13-14. But Nunes had no knowledge of any drug-related criminal history—Mayfield's history related to a weapons incident. RP

21-22. Moreover, criminal history does not give rise to reasonable suspicion. State v. Hobar, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980). Nunes engaged in an obvious fishing expedition for drugs without any actual suspicion of drug use or selling. It was purposeful conduct, not the "negligent" type of contact that occurred in Strieff.

Nor was Mayfield given Miranda warnings. RP 25. The majority below did not mention this as an attenuation factor. This, again, is contrary to Armenta, which considered "the giving of Miranda warnings" in its attenuation analysis. Armenta, 134 Wn.2d at 17.

Finally, the policy implications of finding attenuation here are grave. Like Justice Sotomayor cautioned in her Strieff dissent, upholding Mayfield's conviction will essentially allow—maybe even encourage or embolden—police to illegally seize individuals so long as they recite the magic words (Ferrier warnings) and obtain voluntary consent to search. Any evidence discovered, despite the blatant illegality, is then admissible. This neither protects personal privacy rights nor deters unlawful police conduct, reducing our state and federal constitutional protections to "'a form of words.'" Brown, 422 U.S. at 603 (quoting Mapp, 367 U.S. at 648). The United States Supreme Court has already denounced such a result and so must this court.

This court should hold Ferrier warnings alone do not constitute an intervening circumstance and Mayfield's consent to search was vitiated by the illegal seizure. The evidence discovered in the search of Mayfield's truck should have been suppressed. Without that evidence, the State cannot prove possession with intent to deliver a controlled substance. This court should accordingly reverse the court of appeals, reverse Mayfield's conviction, and remand for dismissal of the charge with prejudice.

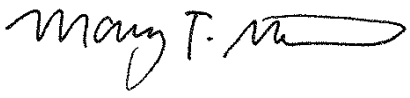
D. CONCLUSION

For the reasons discussed above, this court should reverse the court of appeals and remand for dismissal of the charge with prejudice.

DATED this 10th day of September, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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